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COURT OF APPEALS

CRIMINAL LAW, APPEALS.

STANDARD OF REVIEW IN COURT OF APPEALS FOR MIXED QUESTION OF LAW AND FACT REQUIRED AFFIRMANCE OF DENIAL OF SUPPRESSION MOTION.

The Court of Appeals, affirming the denial of a suppression motion, explained the standard of review in the Court of Appeals for mixed questions of law and fact: "... [P]olice were dispatched ... after an anonymous caller informed a 911 operator that two black males were walking back and forth ... carrying silver colored guns on their waists. One individual was described as wearing a white t-shirt with red letters. The other was wearing a black t-shirt. Two uniformed police officers, each driving a marked patrol car, responded to a radio dispatch concerning the 911 call. The first officer to arrive observed two black males walking side-by-side ... . One male had a black t-shirt and the other male wore a two-toned blue jacket, over what appeared to the officer to be a light-colored t-shirt. The officer parked his vehicle and approached the men on foot. As soon as they saw the officer, one man fled into a backyard and the other man, defendant, continued to walk southbound ... . The officer pursued the fleeing man with his gun drawn and observed the man hide what was later discovered to be a handgun underneath a pile of leaves. When the second officer arrived at the scene, he observed the fleeing man run into the backyard with the first officer running after him and defendant walking ... . No one else was in the area. As the second officer parked and exited his vehicle, defendant yelled an expletive and fled. The officer gave chase and observed a handgun fall from defendant's waist. The [Appellate Division] explained that defendant's flight upon seeing the second officer exit his vehicle provided the officer with the requisite reasonable suspicion of criminal activity to warrant his pursuit of defendant, and the fact that defendant dropped the gun during the pursuit gave rise to probable cause to arrest ... . The issue of whether the second officer had reasonable suspicion to pursue defendant is a mixed question of law and fact, limiting our review ... . Because there is record support for the determination of the lower courts, we affirm ...". ***People v. Gayden*, 2016 N.Y. Slip Op. 07702, CtApp 11-17-16**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF CONSENSUAL SEXUAL ACTS WITH ADULTS, ALTHOUGH NOT PRIOR CRIMES OR BAD ACTS, PROPERLY ADMITTED TO CORROBORATE CHILDREN'S TESTIMONY.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, affirming the Appellate Division, determined evidence of defendant's sexual acts with consenting adults was properly admitted to corroborate the testimony of children who described sexual abuse by the defendant. The children alleged defendant took them into a closet where he abused them (oral sex) while he smoked crack cocaine with his shirt pulled over his head. The children's mother alleged the same scenario with her and other adults. The court noted that the consensual sexual acts with adults were not Molineux evidence because they were not prior bad acts or crimes. The only Molineux evidence was the allegation defendant smoked crack cocaine. Because all the evidence served to corroborate the children's testimony it was not prohibited "propensity" evidence and the probative value outweighed its prejudicial effect: "... [W]e ... note that evidence of defendant's prior sexual acts with adult women is not 'propensity' evidence in its traditional sense. When we limit Molineux or other propensity evidence, we do so for policy reasons, due to fear of the jury's 'human tendency' to more readily 'believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime' ... . But here, that defendant had engaged in oral sex with consenting adult women, while in a closet smoking crack with his shirt pulled over his head, showed no propensity to commit the crimes for which he was on trial. That this evidence corroborated the girls' accounts does not render it propensity evidence, because corroboration and propensity are distinct concepts. Because 'there [was] a proper nonpropensity purpose, the decision whether to admit evidence of defendant's prior . . . acts rests upon the trial court's discretionary balancing of probative value and unfair prejudice' ...". ***People v. Brewer*, 2016 N.Y. Slip Op. 07704, CtApp 11-17-16**

FAMILY LAW, CIVIL PROCEDURE.

WHERE A PARTY IS REPRESENTED BY COUNSEL, THE FAMILY COURT ACT TIME-LIMIT FOR OBJECTING TO AN ORDER BEGINS TO RUN WHEN THE ATTORNEY, NOT THE PARTY, IS NOTIFIED OF THE ORDER.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined the Family Court Act time-limit for objecting to a support order begins to run when the party's counsel, not the party, is notified of the order. Here the party was notified of the order by mail, but counsel was not. The objections to the order were filed more than 35 days after the order was mailed to the party and were rejected on that ground. The Court of Appeals held that, even if a statutory time-limit for service is silent about the issue, where a party is represented by counsel, the time-limit does not start to run until counsel is notified: " '[O]nce a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf' (*Bianca*, 43 NY2d at 173). Indeed, '[t]his is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified' (id.). In particular, as the Court noted, CPLR 2103 (b) provides that '[e]xcept where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney.' *Bianca* governs here. The reference to the mailing of the order to a 'party or parties' in Family Court Act § 439 (e) must be read to require that the order be mailed to the party's counsel, in order for the statutory time requirement to commence." ***Matter of Odunbaku v. Odunbaku*, 2016 N.Y. Slip Op. 07705, CtApp 11-17-16**

FIRST DEPARTMENT

CIVIL PROCEDURE, CIVIL RIGHTS (18 USC 1983), MUNICIPAL LAW.

1983 ACTIONS AGAINST INDIVIDUAL POLICE OFFICERS DO NOT RELATE BACK TO THE ACTION AGAINST THE CITY, MOTION TO AMEND THE COMPLAINT BY ADDING NAMED OFFICERS PROPERLY DENIED.

The First Department determined plaintiffs motion to amend the complaint by adding named police officers (previously listed in the complaint as John or Jane Doe) as defendants was properly denied. The statute of limitations for civil rights violation under 42 U.S.C. § 1983 had passed. The plaintiffs unsuccessfully argued the relation-back doctrine applied because there was a unity of interest between the city defendant and the named police officers: "Plaintiffs argue that Officers Crocitto and Palmerini are united in interest with the City of New York, one of the original defendants, because the officers are employees of the City. It is undisputed, however, that the City cannot be held vicariously liable for its employees' violations of 42 USC § 1983. Rather, the City can be held liable under 42 USC § 1983 only for violating that statute through an unconstitutional official policy or custom ... . Thus, it simply cannot be said that the fortunes in this action of the City and of either Officer Crocitto or Officer Palmerini 'stand or fall together and that judgment against one will similarly affect the other' ... . Because the City has no vicarious liability for Officers Crocitto's and Palmerini's alleged misconduct under 42 USC § 1983, the two officers are not united in interest with the City with respect to the federal false arrest and excessive force claims against them, and the interposition of those claims against the officers does not relate back to the commencement of the action against the City for purposes of the statute of limitations." ***Higgins v. City of New York*, 2016 N.Y. Slip Op. 07748, 1st Dept 11-17-16**

CONTRACT LAW.

INDEMNITOR WAS NOT NOTIFIED OF A TAX AUDIT UNTIL A TAX ASSESSMENT WAS IMPOSED, UNDER THE CONTRACT, PREJUDICE SUFFICIENT TO RELIEVE THE INDEMNITOR OF THE CONTRACTUAL OBLIGATION TO INDEMNIFY NEED NOT ENTAIL TANGIBLE ECONOMIC LOSS, IT WAS ENOUGH THE INDEMNITOR WAS DENIED THE OPPORTUNITY TO CONTROL THE DEFENSE OF THE AUDIT.

The First Department determined the plaintiffs' motion for summary judgment relieving them of liability for the costs of a tax audit should have been granted. In a stock purchase agreement (SPA) plaintiffs agreed to indemnify Dearborn for costs associated with tax audits relating to any time up until the closing date. Dearborn had been sold by plaintiffs to a third party. A tax audit of Dearborn was conducted resulting in a $2.2 million tax assessment. In violation of the SPA, Dearborn did not notify plaintiffs of the tax audit. The SPA provided that the failure to notify would be actionable only to the extent plaintiffs were prejudiced by it. The issue before the First Department was whether the prejudice must be economic loss, or whether the inability to control the defense of the tax audit was sufficient. Reversing Supreme Court, the First Department held the deprivation of the right to control the defense of the audit was sufficient: "What we must determine … is the standard that plaintiffs must meet to demonstrate that the untimely notice of the second audit that they received caused them actual prejudice, and whether, on this record, that standard has been met. We agree with plaintiffs that, contrary to the view of Supreme Court and the position of defendants, in view of their 'sole right' under the SPA to 'control' the defense of the second audit (expressly including the rights to choose counsel and to settle), plaintiffs need not establish 'tangible economic injury' to show that they have been actually prejudiced by the late notice ... . Rather, to establish actual prejudice due to late

notice, it suffices for an indemnitor afforded the right to control the defense of an idemnifiable claim to show that it was deprived of its right to exercise that right for a material portion of the proceedings on the claim." ***Conergics Corp. v. Dearborn Mid-West Conveyor Co.*, 2016 N.Y. Slip Op. 07750, 1st Dept 11-17-16**

CRIMINAL LAW.

STRICT LIABILITY OFFENSE CANNOT SERVE AS A PREDICATE FELONY FOR FELONY ASSAULT.
The First Department determined a strict liability offense cannot serve as a predicate felony for felony assault. The defendant was charged with the unauthorized practice of medicine (Education Law § 6512) which resulted in the serious injury of one victim and the death of another. Because the Education Law offense is a strict liability offense (no mens rea requirement), it cannot serve as the basis for felony assault: "An assault committed during the course of a felony that causes serious physical injury to the victim may be charged as felony assault under Penal Law § 120.10(4). The Court of Appeals has explained that, under the doctrine of constructive malice, the mens rea element of the assault charge is satisfied by the mens rea element of the predicate felony ... . Education Law § 6512(1) does not contain a mens rea element and solely requires a voluntary act of the unauthorized practice of medicine ... . Accordingly, Supreme Court correctly held that the felony of the unauthorized practice of medicine cannot serve as a predicate felony to support the felony assault charges. Further, although the Penal Law states that a 'statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability' (Penal Law § 15.15[2]), the felony of unauthorized practice of medicine was created by the legislature as part of a comprehensive regulatory scheme to require licensing for occupations that pose safety risks to the public. These malum prohibitum crimes are generally construed as strict liability crimes, as a mens rea element would negatively affect enforcement of these statutes and minimize their impact ...". ***People v. Mobley*, 2016 N.Y. Slip Op. 07576, 1st Dept 11-15-16**

CRIMINAL LAW.

PAUCITY OF INFORMATION PROVIDED TO DEFENDANT CONCERNING THE BASIS FOR HER ARREST WARRANTED A SUPPRESSION HEARING DESPITE THE CONCLUSORY ALLEGATIONS IN THE MOTION TO SUPPRESS.
The First Department determined the conclusory allegations in defendant's motion to suppress were sufficient, under the circumstances, to warrant a suppression hearing: "In *People v. Wynn* (117 AD3d 487 [1st Dept 2014]), we held that the court erred in summarily denying the motion of defendant's codefendant to suppress statements and physical evidence as the fruits of an unlawful arrest, notwithstanding the conclusory nature of the factual allegations in her suppression motion, where "[a]lthough the People provided defendant with extensive information about the facts of the crime and the proof to be offered at trial, they provided no information whatsoever, at any stage of the proceedings, about how defendant came to be a suspect, and the basis for her arrest, made hours after the crime at a different location" (*id*. at 487-488). Because the factual allegations in the People's pleadings and relevant disclosures were materially the same in this case, we conclude that defendant's motion to suppress, although it asserted nothing more than that probable cause was lacking, was sufficient under the circumstances to entitle him to a hearing. Unlike the situation in *People v. Lopez* (5 NY3d 753, 754 [2005]), defendant's statement did not 'on its face show[] probable cause for defendant's arrest.' " ***People v. Terry*, 2016 N.Y. Slip Op. 07751, 1st Dept 11-17-16**

CRIMINAL LAW, EVIDENCE.

ALLEGED VICTIM OF ASSAULT PROPERLY ALLOWED TO TESTIFY FROM EGYPT VIA SKYPE.
The First Department determined the alleged victim of an assault was properly allowed to testify by Skype from Egypt. The victim had been prohibited from returning to the U.S. from Egypt and the prosecutor had done everything possible to facilitate his return: "We conclude that, given the unusual circumstances of this case, and the prosecutor's good faith, the People made the specific, individualized showing necessary to justify remote video testimony. The Confrontation Clause's general guarantee of face-to-face testimony is not absolute ... . Video testimony is permissible 'provided there is an individualized determination that denial of physical, face-to-face confrontation is necessary to further an important public policy and the reliability of the testimony is otherwise assured' (*People v. Wrotten*, 14 NY3d 33…). Moreover, in *Wrotten*, the Court of Appeals recognized that video testimony could be employed in circumstances other than those involving a vulnerable child witness or a witness who was too ill to appear in court, as was the case in *Wrotten* (*id*. at 39-40). Defendant concedes that the two-way video testimony at issue 'preserve[d] the essential safeguards of testimonial reliability' ... . The dispositive question is whether the testimony was 'necessary to further an important public policy' ... , which, in this case, is 'the public policy of justly resolving criminal cases' ... , a showing that must be made by clear and convincing evidence ...". ***People v. Giurdanella*, 2016 N.Y. Slip Op. 07577, 1st Dept 11-15-16**

FAMILY LAW.

APPELLANT PROPERLY FOUND TO BE A PERSON LEGALLY RESPONSIBLE FOR THE CHILD, CRITERIA EXPLAINED.
The First Department, affirming a neglect finding, explained that appellant was properly found to be "a person legally responsible for the subject child: "A person legally responsible for a child is defined as the child's 'custodian, guardian, or any other person responsible for the child's care at the relevant time.' A '[c]ustodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the . . . neglect of the child' (Family Ct Act § 1012[g]). A person who 'acts as the functional equivalent of a parent in a familial or household setting' is a person legally responsible for a child's care ... . * * * Appellant testified that he cared for the younger children every work day by taking them to school and picking them up, preparing meals, cleaning the home, preparing the children's clothing, grocery shopping, and providing financial assistance to the household. The school social worker and appellant both testified that M.W. lived in the home in September 2014, when the incident took place. Although appellant later changed his testimony concerning her residence, the court properly credited his initial statement and found that he was a person legally responsible for M.W. Given her age, she did not require the same hands-on care as the younger children, but his testimony reflected that he contributed to the functioning of the household of which she was a part and had frequent regular contact with her ...". ***Matter of Keniya G. (Avery P.)*, 2016 N.Y. Slip Op. 07752, 1st Dept 11-17-16**

PERSONAL INJURY.

PLAINTIFF COULD NOT IDENTIFY CAUSE OF FALL AND ANY DEFECTS IN THE SIDEWALK WERE INSIGNIFICANT.
The First Department determined defendants' motion for summary judgment in this sidewalk slip and fall case was properly granted. Plaintiff could not identify the cause of the fall and any defect that might have existed was deemed trivial: "Defendants established prima facie that any defect in the sidewalk that allegedly caused plaintiff to trip and fall was insignificant and that there were no surrounding circumstances that magnified the dangers it posed ... . They submitted plaintiff's testimony that he could not describe the characteristics of the alleged defect or specify exactly where on the sidewalk he fell, and an affidavit by an expert who took photographs and measured the area and found no defect presenting an elevation differential of more than one quarter inch and no space between sidewalk slabs greater than one half inch. Contrary to plaintiff's contention, the fact that the photographs were taken and the inspection performed almost two years after the accident is immaterial. Defendants submitted testimony that there had been no repairs to the sidewalk since the accident, and plaintiff does not argue that the photographs do not show the sidewalk in substantially the same condition as existed at the time of the accident. In opposition, plaintiff failed to raise a triable issue of fact. He was unable to describe the defect, except to say that it was not wide and it was not deep, and he cites no surrounding circumstances that enhanced the danger. Nor did he offer any measurements of the alleged defects in the area of his fall in refutation of defendants' expert's measurements." ***Saab v. CVS Caremark Corp.*, 2016 N.Y. Slip Op. 07763, 1st Dept 11-17-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

FALL OFF BACK OF FLATBED TRUCK WARRANTED SUMMARY JUDGMENT ON LABOR LAW 240 (1) CAUSE OF ACTION.
The First Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff was knocked off the back of a flatbed truck. The Labor Law 241(6) cause of action was properly dismissed (no sufficiently specific industrial code regulation applied). And defendants' control over the injury-producing work was insufficient to support the Labor Law 200 cause of action: "The injured plaintiff testified that a metal beam, while being placed on a flatbed truck, fell off the blades of a forklift, slamming plaintiff's foot and causing him to fall off the truck. This unrefuted testimony established prima facie that 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' and therefore that liability exists under Labor Law § 240(1) ... . The cases that defendants rely on are inapposite, since they involve not objects falling on or toward workers on flatbeds but workers falling from flatbeds, implicating only the adequacy of safety devices for falling workers, which is not at issue here ... . Nor was plaintiff the sole proximate cause of his injuries since the injuries 'were caused at least in part by the lack of safety devices to check the beam's descent as well as the manner in which [his coworker] lowered the beam' ...". ***McLean v. Tishman Constr. Corp.*, 2016 N.Y. Slip Op. 07754, 1st Dept 11-17-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

COURT SHOULD NOT HAVE DENIED DISMISSAL/SUMMARY JUDGMENT MOTIONS ON A GROUND NOT RAISED IN OPPOSITION AND ON TECHNICAL GROUNDS WHICH SHOULD HAVE BEEN IGNORED.
The Second Department determined: (1) a motion for summary judgment should not have been denied based upon a ground not raised by any party in opposition; (2) a motion for summary judgment should not have been denied based on

the failure to attach all of the parties' pleadings to the motion papers; and (3) a motion should not have been denied because it was directed at an amended complaint which was never served, rather than the original complaint: "The Supreme Court erred in denying that branch of the ... defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them due to their failure to provide all of the pleadings, as required by CPLR 3212(b). In this regard, the ... defendants submitted the complaint and their answer, but did not submit the answers of the other defendants. The ... plaintiffs, in opposition, did not contend that this branch of the ... defendants' motion should be denied due to the ... defendants' failure to fully comply with CPLR 3212(b). Consequently, the court should not have raised the issue on the ... plaintiffs' behalf ... . Moreover, under the circumstances, the ... defendants' failure to submit the answers of the other defendants was a mere irregularity and, since no substantial right of any party was prejudiced, the court should have disregarded that defect and reached the merits of that branch of the ... defendants' motion ... . [T]he court should have disregarded the error ... in moving against the amended complaint instead of the original complaint, since it did not affect the merits or prejudice a substantial right of the ... plaintiffs ...". ***Mew Equity, LLC v. Sutton Land Servs., LLC*, 2016 N.Y. Slip Op. 07630, 2nd Dept 11-16-16**

CIVIL PROCEDURE.

COURT PROPERLY AWARDED DECLARATORY JUDGMENT IN DEFENDANT'S FAVOR AS A MATTER OF LAW UPON DEFENDANT'S MOTION TO DISMISS.

The Second Department determined Supreme Court properly determined a declaratory judgment action in defendant's favor as a matter of law in the context of defendant's motion to dismiss: "A motion to dismiss a cause of action for declaratory relief generally 'presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration' ... . However, 'where the court, deeming the material allegations of the complaint to be true, is nonetheless able to determine, as a matter of law, that the defendant is entitled to a declaration in his or her favor, the court may enter a judgment making the appropriate declaration' ... . Here, deeming the material allegations of the complaint to be true and considering the documents that were attached to and made part of the complaint (see CPLR 3014), including the stipulation of settlement, the Supreme Court properly determined, as a matter of law, that defendant was entitled to a declaration in her favor ...". ***Pilgrim v. Pantorilla*, 2016 N.Y. Slip Op. 07634, 2nd Dept 11-16-16**

CIVIL PROCEDURE.

FAILURE TO FILE PROOF OF SERVICE IS A CORRECTABLE DEFECT, PETITION SHOULD NOT HAVE BEEN DENIED ON THAT GROUND.

The Second Department determined failure to file proof of service of a petition and notice of petition should not have resulted in the denial of the petition. The motion court raised the ground for denial itself. Rather than denying the petition, the motion court should have alerted the parties to the defect and allowed it to be cured: " 'The failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004' … . Here, there is no dispute that the respondents were served with the notice of petition and petition, as they moved to dismiss on the ground that the petition failed to state a cause of action. At no time did they argue that the proceeding should be dismissed for failure to file proof of service. As such, the parties did not have an opportunity to address the purported failure to file proof of service, the ground upon which the Supreme Court relied in denying the petition and dismissing the proceeding, even though such defect is readily curable (see CPLR 2001, 2004). 'The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process' … . Therefore, the Supreme Court should have alerted the parties to the purported defect and afforded the appellant an opportunity to correct it, rather than denying the petition and dismissing the proceeding...". ***Matter of Meighan v. Ponte*, 2016 N.Y. Slip Op. 07653, 2nd Dept 11-16-16**

CONTRACT LAW, CIVIL PROCEDURE.

CONTRACTUALLY SHORTENED STATUTE OF LIMITATIONS ENFORCED.

The Second Department determined a shortened statute of limitations agreed to in a stock purchase contract was properly enforced. Plaintiff discovered that defendant had not paid the full purchase price for the stock, and brought a breach of contract action after the contractual statute of limitations had expired: " 'Parties to a contract may agree to limit the period of time within which an action must be commenced to a period shorter than that provided by the applicable statute of limitations' ... . To be enforceable, such provision must be clear and unambiguous ... . 'Whether or not a writing is ambiguous is a question of law to be resolved by the courts' ... . ' Absent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced' ... . Contrary to the plaintiff's contention, the plain language of the provision limiting the time period to bring an 'action based on any warranty, covenant or representation contained in this Agreement' is clear and unambiguous, and applies to the defendant's covenant to pay ... . This interpretation is consistent with the plain meaning of the contract and basic principles

of contract construction that an interpretation which renders language in the contract superfluous cannot be supported ...". ***Batales v. Friedman*, 2016 N.Y. Slip Op. 07615, 2nd Dept 11-16-16**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

QUESTIONING OF DEFENDANT, WHO WAS REPRESENTED ON ANOTHER CHARGE, VIOLATED DEFENDANT'S RIGHT TO COUNSEL, STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

The Second Department determined defendant's statements in connection with a murder charge were made in violation of his right to counsel. A new trial was ordered. At the time defendant was questioned about a robbery and a murder (the "gas station shooting"), he was represented on a marijuana charge. The robbery and murder occurred at different times and places, but defendant allegedly was the getaway driver for both. The trial court ruled the statements related to the robbery were made in violation of defendant's right to counsel but the statements related to the murder were admissible. The Second Department noted that it is statutorily prohibited from revisiting the trial court's suppression of the robbery statements. Since the Second Department concluded that the robbery and murder interrogations were necessarily intertwined, the murder statements should have been suppressed: "The Court of Appeals has recognized two categories of cases in which the attachment of counsel on one crime may preclude the police from interrogating a suspect on the subject of another crime. In *People v. Cohen* (90 NY2d 632), the Court of Appeals stated that 'where the two criminal matters are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel[,] . . . interrogation on the unrepresented crime is prohibited even in the absence of direct questioning regarding the crime on which counsel had appeared' ... . With respect to the second category, the Court of Appeals has stated that 'a statement may be subject to suppression where impermissible questioning on a represented charge was, when viewed as an integrated whole, not fairly separable from otherwise permissible questioning on the unrepresented matter and was, in fact, purposely exploited to aid in securing inculpatory admissions on the [unrepresented matter]' ... . ***People v. Henry*, 2016 N.Y. Slip Op. 07676, 2nd Dept 11-16-16**

CRIMINAL LAW, EVIDENCE.

COURT SHOULD NOT HAVE DISMISSED INDICTMENT ON GROUND NOT RAISED BY THE DEFENDANT WITHOUT GIVING THE PEOPLE THE OPPORTUNITY TO ADDRESS IT, EVIDENCE BEFORE THE GRAND JURY DID NOT SUPPORT THE AGENCY DEFENSE.

The Second Department determined County Court should not have dismissed the indictment upon reading the grand jury minutes, on a ground not raised by the defendant, without giving the People the opportunity to address it. County Court found that the evidence presented to the grand jury warranted the agency-defense instruction, which was not given: "The County Court erred in dismissing the indictment based upon a specific defect in the grand jury proceedings not raised by the defendant, without affording the People notice of the specific defect and an opportunity to respond (see CPL 210.45[1]...). Contrary to the defendant's contention, the People did not waive their right to notice and an opportunity to be heard by failing to move to reargue the court's order ... . Furthermore, upon our review of the record, we find that no reasonable view of the evidence presented to the grand jury warrants an instruction on the defense of agency ... . The defendant's actions were consistent with that of a 'steerer,' and not a mere extension of the buyer ... . In addition, because the defendant did not testify before the grand jury, no evidence was presented indicating that he did not stand to profit from the sale or that he had no independent desire to promote the transaction ...". ***People v. Cruz*, 2016 N.Y. Slip Op. 07673, 2nd Dept 11-16-16**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT SHOULD NOT HAVE APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO DENY A PETITION TO VACATE AN ACKNOWLEDGMENT OF PATERNITY.

Under the unique facts, the Second Department determined Family Court should not have applied the doctrine of collateral estoppel to prohibit Omar from contesting paternity. Omar had signed an acknowledgment of paternity two days after the child was born. However, twice thereafter Omar filed petitions to vacate his acknowledgment supported by DNA tests: "Family Court should have declined to apply the doctrine of collateral estoppel. 'Collateral estoppel, an equitable doctrine, is based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue decided against it' ... . '[W]hether to apply collateral estoppel in a particular case depends upon general notions of fairness involving a practical inquiry into the realities of the litigation' ... . The doctrine is highly flexible in nature, and should not be rigidly or mechanically applied, even where its technical requirements are met ... . '[T]he fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings' ... ". ***Matter of Kaori (Omar J.–Shalette S.)*, 2016 N.Y. Slip Op. 07649, 2nd Dept 11-16-16**

LABOR LAW-CONSTRUCTION LAW.

FALL FROM A SCAFFOLD DID NOT WARRANT SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF DID NOT DEMONSTRATE THE FAILURE TO PROVIDE PROPER PROTECTION.

The Second Department determined summary judgment should not have been granted to plaintiff on his Labor Law 240 (1) cause of action. Plaintiff fell from a scaffold but his papers did not make out a prima facie case: "To establish liability pursuant to Labor Law § 240(1), a plaintiff must show that the statute was violated, and that the violation was a proximate cause of his or her injuries ... . The mere fact that a plaintiff fell from a scaffold 'does not establish, in and of itself, that proper protection was not provided, and the issue of whether a particular safety device provided proper protection is generally a question of fact for the jury' ... . Here, the plaintiff's own submissions demonstrated the existence of triable issues of fact as to how the accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide him with protection proximately caused his injuries ...". ***Karwowski v. Grolier Club of City of N.Y.*, 2016 N.Y. Slip Op. 07625, 2nd Dept 11-16-16**

MUNICIPAL LAW, IMMUNITY, PERSONAL INJURY.

COUNTY DID NOT DEMONSTRATE THE NEED FOR A LEFT TURN SIGNAL HAD BEEN STUDIED, THEREFORE THE COUNTY WAS NOT ENTITLED TO SUMMARY JUDGMENT ON IMMUNITY GROUNDS.

The Second Department determined the county's motion for summary judgment was properly denied in this intersection car accident case. Plaintiff alleged the county was negligent in failing to install a traffic control device with a left turn signal, because there was a designated lane for a left turn. The accident occurred when plaintiff attempted to make a left turn. Because the county did not demonstrate the issue had been adequately studied, it did not demonstrate government immunity applied. Therefore the county's motion was properly denied without need to address the opposing papers: "A governmental entity has a duty to the public to keep its streets in a reasonably safe condition ... . 'While this duty is nondelegable, it is measured by the courts with consideration given to the proper limits on intrusion into the [government's] planning and decision-making functions. Thus, in the field of traffic design engineering, the State is accorded a qualified immunity from liability arising out of a highway planning decision' ... . Under the doctrine of qualified immunity, a governmental entity may not be held liable for a highway safety planning decision unless its study of a traffic condition is plainly inadequate, or there is no reasonable basis for its traffic plan ... . Immunity will apply only 'where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury' ... . Here, the County failed to establish that the design of the subject traffic signal, including the determination that no left-turn signal was warranted, was based on a study which entertained and passed on the very same question of risk that the plaintiff would put to a jury ...". ***Warren v. Evans*, 2016 N.Y. Slip Op. 07641, 2nd Dept 11-16-16**

MUNICIPAL LAW, PERSONAL INJURY, MEDICAL MALPRACTICE.

MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, DEFENDANT HAD ALREADY CONDUCTED A 50-h HEARING AND THEREFORE HAD NOTICE OF THE ESSENTIAL FACTS WITHIN ONE MONTH OF THE EXPIRATION OF THE 90-DAY TIME LIMIT.

The Second Department determined plaintiff's motion to serve a late notice of claim should have been granted. The plaintiff served a notice of claim 30 days after the 90-day time limit expired, but defendant NYC Health and Hospitals Corporation conducted a 50-h hearing. After serving the summons and complaint, the plaintiff moved for leave to file a late notice of claim: "General Municipal Law § 50-e(5) permits a court to extend the time to serve a notice of claim. In determining whether to grant such an extension, the court must consider various factors, of which the 'most important' is 'whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter' ... . Under the circumstances of this case, in which the defendant received a late notice of claim less than one month after the expiration of the 90-day period, which it accepted and with respect to which it conducted an examination pursuant to General Municipal Law § 50-h, the defendant acquired actual knowledge of the essential facts underlying the claim within a reasonable time after the expiration of the 90-day period ...". ***Brunson v. New York City Health & Hosps. Corp.*, 2016 N.Y. Slip Op. 07618, 2nd Dept 11-16-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

MAKESHIFT TABLE SAW, MADE FROM A PORTABLE SAW, SUBJECT TO INDUSTRIAL CODE PROVISION REQUIRING GUARDS ON TABLE SAWS, UNTIMELY SUMMARY JUDGMENT MOTION BASED ON GROUNDS IDENTICAL TO A TIMELY MOTION BROUGHT BY ANOTHER PARTY SHOULD BE CONSIDERED.

The Second Department determined plaintiff's Labor Law 241 (6) cause of action should not have been dismissed. Although the specific Industrial Code regulation relied upon by plaintiff was not identified in the pleadings no prejudice resulted from any delay in identifying it. Plaintiff's thumb was severed using a makeshift table saw consisting of a circular saw attached to the bottom of a table. Supreme Court held the Industrial Code regulation requiring a guard on a table saw did not apply to a portable saw. However, the portable saw was being used as a table saw, thus the regulation applied. The Second

Department also noted that an otherwise untimely motion or cross motion for summary judgment should be considered if the issues raised are identical to a timely summary judgment motion made by another party. Here portions of the untimely motion were identical to the timely motion, but other portions were not. The identical portions should have been considered. ***Sheng Hai Tong v. K & K 7619, Inc.*, 2016 N.Y. Slip Op. 07637, 2nd Dept 11-16-16**

THIRD DEPARTMENT

WORKERS' COMPENSATION LAW.

CLAIMANT PRECLUDED FROM FURTHER WORKERS' COMPENSATION BENEFITS FOR FAILURE TO SEEK PERMISSION BEFORE SETTLING A RELATED TORT ACTION, MEANING OF THIRD PARTY ACTION IN THIS CONTEXT EXPLAINED.

The Third Department determined claimant did not seek permission from her Workers' Compensation carrier before settling another action which arose from the some of the same allegations as her Workers' Compensation claim. Therefore she was precluded from receiving future Workers' Compensation benefits. Claimant unsuccessfully argued that the federal court action which settled was not a "third party" action within the meaning of the Workers' Compensation Law because the action was against claimant's co-worker and employer, not a "third party:" ' "Workers' Compensation Law § 29 (5) requires either the carrier's consent or a compromise order from the court in which the third-party action is pending for a claimant to settle a third-party action and continue receiving compensation benefits' ... . Claimant urges that her federal lawsuit was not a third-party action since the statute addresses 'the negligence or wrong of another not in the same employ' (Workers' Compensation Law § 29 [1]) and the associate dean who harassed her had the same employer as her. The Court of Appeals, however, has recently reiterated that Workers' Compensation Law § 29, 'read in its entirety and in context, clearly reveals a legislative design to provide for reimbursement of the compensation carrier whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits' ... . 'The Court reasoned that '[i]t would be unreasonable to read the statute as mandating a different result merely because the recovery came out of the pockets of a coemployee [or the employer] and not from the resources of a stranger' ...". ***Matter of Shiner v. SUNY at Buffalo*, 2016 N.Y. Slip Op. 07738, 3rd Dept 11-17-16**

FOURTH DEPARTMENT

CRIMINAL LAW.

JUDGE SHOULD HAVE MADE AN INQUIRY INTO ALLEGATIONS OF JUROR BIAS BASED UPON AN OBSERVATION DURING A RECESS, NEW TRIAL ORDERED.

The Fourth Department, over a two-justice dissent, determined the trial judge should have inquired further into the allegation of juror bias. One of defendant's friends told the court two jurors were overheard referring to defendant as a scumbag during a recess: " 'If at any time after the trial jury has been sworn and before the rendition of its verdict, . . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case . . . the court must discharge such juror' (CPL 270.35 [1]). The standard for discharging a sworn juror is satisfied ' when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict' ... . There is a well-established framework by which the court must evaluate a sworn juror who, for one reason or another, may possess such a state of mind ... . To make a proper determination, the court 'must question each allegedly unqualified juror individually in camera in the presence of the attorneys and defendant' (*Buford*, 69 NY2d at 299). 'In a probing and tactful inquiry, the court should evaluate the nature of what the juror has seen, heard, or has acquired knowledge of, and assess its importance and its bearing on the case' (*id*.). During the inquiry, 'the court should carefully consider the juror's answers and demeanor to ascertain whether [his or] her state of mind will affect [his or] her deliberations' (*id*.). That accomplished, the court must place the reasons for its ruling on the record (see *id*.). It has been emphasized repeatedly that 'each case must be evaluated on its unique facts' ... . To that end, the court must hold a Buford inquiry whenever there are facts indicating the possibility of juror bias, and must not base its ruling on speculation ... . Not only does the court's failure to hold an inquiry under such circumstances constitute reversible error, but its failure to place the reasons for its ruling on the record also constitutes reversible error ... . Such errors are not subject to harmless error analysis ...". ***People v. Kuzdzal*, 2016 N.Y. Slip Op. 07768, 4th Dept 11-18-16**

CRIMINAL LAW.

NOT ASKING A GRAND JURY TO CONSIDER A CHARGE FOR WHICH SOME EVIDENCE WAS PRESENTED DID NOT AMOUNT TO WITHDRAWAL OF THE CHARGE (WHICH WOULD REQUIRE JUDICIAL PERMISSION TO RE-PRESENT).

The Fourth Department determined that not asking a grand jury to consider a charge is not the same as withdrawing a charge from the grand jury (which would require a judge's permission to re-present): "... [T]he Court of Appeals has made

clear that, '[b]efore a grand jury may be said to have acted upon a charge, there must be some indication that it knew about it' (*Wilkins*, 68 NY2d at 274). Moreover, '[t]here is no evidence in this record that would raise the primary concern of . . . *Wilkins*, namely that the People withdrew [the criminal sale charges] in order to present [them] to a more compliant grand jury' ... . The People's decision not to present the criminal sale charges for the consideration of the first grand jury is not 'fundamentally inconsistent with the objectives underlying CPL 190.75' ... , and we therefore conclude that this case does not present those ' limited circumstances' to which the holding of Wilkins applies (*id*.)." ***People v. Lopez*, 2016 N.Y. Slip Op. 07772, 4th Dept 11-18-16**

CRIMINAL LAW.

ASKING DEFENDANT WHY HE WAS NERVOUS DEEMED A NONINCRIMINATING QUESTION, SUPPRESSION PROPERLY DENIED.

The Fourth Department determined the police officer's asking defendant (a passenger in a car pulled over for a traffic infraction) why he was nervous was a nonincriminating question. Therefore defendant's statement he had "a little bit of weed" and the results of a search were not subject to suppression: "We conclude that, after the stop, the officer was permitted to approach defendant as a passenger in the vehicle and ask nonincriminating questions ... . Contrary to defendant's contention, the officer's question in response to defendant's manifest nervousness did not 'exceed[ ] a request for information and the question[ ] was neither invasive nor focused on possible criminality' ... . Indeed, defendant's admission that he possessed marijuana in response to the officer's inquiry 'went far beyond what the officer's words could reasonably expect to evoke ...". ***People v. Williams*, 2016 N.Y. Slip Op. 07776, 4th Dept 11-18-16**

CRIMINAL LAW.

ASKING DEFENDANT WHY HE WAS NERVOUS AND WHETHER HE WAS CARRYING DRUGS DEEMED INVASIVE QUESTIONING, SUPPRESSION GRANTED.

The Fourth Department determined asking defendant (who was on a bicycle and properly stopped) why he was so nervous and whether he was carrying drugs was invasive questioning unsupported by an indication of criminal activity. Suppression of defendant's statements and seized evidence should have been granted: "... [F]ollowing the permissible stop of defendant on his bicycle, the officers improperly escalated the encounter to a level two common-law inquiry by asking defendant why he was so nervous and whether he was carrying drugs. The officers' inquiries, which involved 'invasive questioning' that was 'focuse[d] on the possible criminality' of defendant ... , were not supported by the requisite founded suspicion of criminality ... . The testimony at the suppression hearing establishes that the officers observed nothing indicative of criminality, and we conclude that defendant's nervousness upon being confronted by the police did not give rise to a founded suspicion that criminal activity was afoot ... . Because defendant's inculpatory oral response to the impermissible accusatory questioning resulted in the seizure of the drugs from defendant's pocket and a postarrest written statement from defendant, the drugs and the oral and written statements must be suppressed ...". ***People v. Freeman*, 2016 N.Y. Slip Op. 07784, 4th Dept 11-18-16**

FAMILY LAW, JUDGES.

FAMILY COURT JUDGE SHOULD HAVE RECUSED HERSELF AFTER DEATH THREAT BY FATHER.

The Fourth Department determined the Family Court judge should have recused herself from a dispositional hearing in a permanent neglect proceeding. Father had made a death threat against the judge following the finding of permanent neglect: "It is well settled that, '[a]bsent a legal disqualification under Judiciary Law § 14, a . . . Judge is the sole arbiter of recusal' ... , and the decision whether to recuse is committed to his or her discretion ... . Under these circumstances, and particularly in view of the order of protection, we conclude that the court abused its discretion in refusing to recuse itself ...". ***Matter of Trinity E. (Robert E.)*, 2016 N.Y. Slip Op. 07804, 4th Dept 11-18-16**

FORECLOSURE, USURY.

LOAN WHICH INCLUDED A SET AMOUNT DESIGNATED AS INTEREST WAS NOT USURIOUS, CRITERIA EXPLAINED.

The Fourth Department determined the loan secured by a mortgage was not usurious. The $170,000 loan included $43,000 designated as interest. Whether the interest was usurious should have been determined based upon the term of loan, not when the foreclosure action was commenced: "In determining whether the interest charged exceeded the usury limit, courts must apply the traditional method for calculating the effective interest rate as set forth in *Band Realty Co. v. North Brewster, Inc.* (37 NY2d 460, 462 ...). According to that method, '[s]o long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury' ... . In applying the traditional formula, '[t]he discount, divided by the number of years in the term of the mortgage, should be added to the amount of interest due in one year, and this sum is compared to the difference between the principal and the discount in order to determine the true interest rate' ... . Applying that formula to the case at bar, which involves a five-year mortgage of $170,000 with a $43,000 "discount" with no additional interest, we

add $8,600, which is one-fifth of the discount, to the interest over the first year (0%), arriving at a sum of $8,600. Comparing the $8,600 figure to the difference between the principal and the discount retained by plaintiff, i.e., $127,000, the interest rate was 6.77% per annum. That interest rate is well below the civil usury rate of 16% per annum ...". ***Canal v. Munassar*, 2016 N.Y. Slip Op. 07793, 4th Dept 11-18-16**

MUNICIPAL LAW, PERSONAL INJURY.

RECKLESS DISREGARD STANDARD APPLIED TO COLLISION BETWEEN BICYCLE AND POLICE CAR, EVEN THOUGH THE OFFICER WAS NOT IN PURSUIT.

The Fourth Department, reversing (modifying) Supreme Court, determined that the "reckless disregard" standard applied to the defendant police officer's driving and dismissed plaintiff bicyclist's complaint. Apparently, the officer was moving his car into an intersection, trying to get the attention of another driver to whom he wished to speak. Plaintiff bicyclist, who had the green light, collided with the officer's car: "... [W]e note that there is no dispute that defendant officer was operating an 'authorized emergency vehicle' (Vehicle and Traffic Law § 101). We reject plaintiff's contention that, in determining whether defendant officer's operation of the police vehicle qualifies as an 'emergency operation' within the meaning of Vehicle and Traffic Law § 114-b, we should adopt the definition of 'pursuit' contained in the operations manual of defendant City of Syracuse Police Department ... . Likewise, it is irrelevant whether defendant officer believed he was involved in an emergency operation ... . Contrary to plaintiff's further contentions, we conclude that defendant officer's actions constituted an 'emergency operation' as contemplated by Vehicle and Traffic Law § 114-b ... ; the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence (see § 1104 [e]...); and defendants established as a matter of law that defendant officer's conduct did not constitute the type of recklessness necessary for liability to attach ...". ***Lacey v. City of Syracuse*, 2016 N.Y. Slip Op. 07794, 4th Dept 11-18-16**

PERSONAL INJURY.

ABSENCE OF MARKINGS OR COLOR DIFFERENTIATION BETWEEN STEP AND SIDEWALK CREATED AN ISSUE OF FACT WHETHER THE STEP WAS A DANGEROUS CONDITION, IRRESPECTIVE OF PLAINTIFF'S POSSIBLE COMPARATIVE NEGLIGENCE.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. There was evidence a step leading to defendants' premises was dangerous because there were no markings or differences in color between the step and the sidewalk: " '[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury' ... . In view of the pertinent 'factors that may render a physically small defect actionable' ... , we conclude … (defendants) failed to sustain their burden of establishing as a matter of law the absence of any defect with the step ... . In any event, we conclude that, in opposition to the motion and cross motion, plaintiff raised a triable issue of fact concerning the existence of a defect by submitting evidence that there were no markings on the step or differences in color between the step and the sidewalk ... . Furthermore, the step was located in or very near a doorway, 'where a person's attention would be drawn to the door, not to the [step]' ... . We further conclude that the court erred in determining that plaintiff's inattention to the step upon exiting the premises was the sole proximate cause of her injuries as a matter of law inasmuch as defendants 'failed to establish that plaintiff's fall was unrelated to the alleged defect' ... . Thus, 'while plaintiff may have been comparatively negligent in failing to observe the step or in failing to remember that the step was there, any such comparative negligence would not serve to negate the liability of the . . . landowner[,] who has a duty to keep the premises safe' ... ". ***Grefrath v. DeFelice*, 2016 N.Y. Slip Op. 07786, 4th Dept 11-18-16**

PERSONAL INJURY.

PROFESSIONAL WRESTLER ASSUMED RISK OF INJURY WHEN JUMPING FROM THE ROPES INTO THE RING.

The Fourth Department determined the doctrine of primary assumption of the risk precluded recovery by a professional wrestler for injuries resulting from a planned jump from the ropes into the ring: "Here, the court properly concluded that the risk of severe neck and back injuries is inherent in the planned and staged activity engaged in by plaintiff, i.e., jumping from a four-foot high rope onto a wrestling ring, landing on one's back, and then being pushed out of the ring by another performer. Thus, 'it is indisputable that . . . plaintiff assumed the risk of landing incorrectly when tumbling in the manner he had been trained to do during his [five-year career as a professional wrestling performer]. The fact that the [rope was slightly looser], a circumstance of which . . . plaintiff was plainly aware, does not raise an issue of fact' ... . Therefore, 'by participating in the [exhibition], plaintiff consented that the duty of care owed him by defendants was no more than a duty to avoid reckless or intentionally harmful conduct . . . [and] consent[ed] to accept the risk of injuries that are known, apparent or reasonably foreseeable consequences of his participation in' that exhibition ... , including the risk of the injuries he sustained." ***Kingston v. Cardinal O'Hara High School*, 2016 N.Y. Slip Op. 07798, 4th Dept 11-18-16**

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